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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1597

GERRIT LANSING,

Petitioner,

v.

New York Stock Exchange
An Unincorporated Association

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gerrit Lansing, plaintiff-appellant for his petition prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit entered herein on January 28, 1974.

OPINIONS BELOW

(a) There are no official or unofficial reports of opinions of the Court below. The only opinion is a post-decision memorandum by Judge Bonsal in the U.S. District Court for the Southern District of New York dated July 9, 1973. No opinion is reported. The memorandum of Judge Bonsal is appended.

JURISDICTION

(b) The grounds on which the jurisdiction of this Court is invoked are found in 28 US 1254 subdivision 1.

JURISDICTION AND AFFIRMANCE BELOW

(i) The date of the judgment in the U.S. District Court is May 24, 1973. It was entered on May 24, 1973. The post-decision memorandum in the U.S. District Court Southern District of New York was filed on July 9, 1973. The date of the judgment of the United States Court of Appeals for the Second Circuit is January 28, 1974, entered on that day after argument. A copy is appended. The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U.S. Code 1254 Subdivision 1: The cases believed to sustain jurisdiction are, *U.S. vs. Beatty* 232 U.S. 463 *Shapiro vs. U.S.* 235 U.S. 12.

QUESTIONS PRESENTED FOR REVIEW

(c) The questions presented by this appeal are as follows:

(1) Whether plaintiff established a prima facie case of fraud by defendant New York Stock Exchange when he proved that with knowledge of its employee Examiners charged by defendant with the duty to check member firms' financial statements of financial condition filed with the defendant as required by defendant found that audit which was filed on February 20, 1967 (Plff's Exhibit 19) did not conform to the Financial Questionnaire prepared by Haskins & Sells and filed by defendant with the S.E.C. (Plff's Exhibit 5) upon which audit (Plff's Exhibit 2) defendant required plaintiff to rely as a condition to their allowing plaintiff to become a subordinated lender.

(2) Whether plaintiff established a prima facie case that the defendant New York Stock Exchange delegated to Pickard & Company, Inc., a member of the association of

the defendant New York Stock Exchange to obtain as its agent from plaintiff the so called knowledgeability letter on which defendant required by its terms that plaintiff rely as the latest certified audit of Haskins & Sells dated August 31, 1966.

(3) Whether the said alleged certified copy of the audit of Haskins & Sells filed on February 20, 1974 but dated December 14, 1966 was not an authentic certified copy of the audit but a forgery by completion by a certification of the earlier audit of Haskins and Sells, and in fact was itself never certified by anyone as pretended.

(4) Whether plaintiff established a prima facie case of fraud by defendant in suppressing its knowledge of embezzlement by officers of Pickard & Company on or before June 16, 1966 without taking disciplinary measures required by its rules and permitting Pickard & Company, Inc. to continue to solicit subordinated capital because the defendant wished to improve the capital ratio of Pickard & Company, Inc. so as to avoid their suspension and the damage thereof to defendant association of which it was a member.

(5) Whether defendant did not acknowledge it knew of this embezzlement by the execution of a subsequent proof of loss to an insurance company executed by its Chief Examiner McChesney acting as Liquidator on defendant's behalf.

(6) Was defendant guilty of Criminal facilitation of compounding a crime under Penal Law of New York Section 115.00 and 215.45 for retaining in its files as valid a financial statement of a member firm that was forged by completion and in suppressing an embezzlement by officers of said member firm without denouncing same and informing plaintiff and other customers and prospective customers.

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

(c) Plaintiff became a subordinated lender to a member of an association, known as the New York Stock Exchange, on June 8, 1967. Within the year the member firm was disclosed to be hopelessly insolvent. As a condition to his being permitted by defendant to become a subordinated lender plaintiff was obliged to sign a so-called knowledgeability letter in which it was specifically provided that he should rely on the latest certified audit of the member firm by Haskins & Sells dated October 31, 1966. On behalf of the defendant, an officer of the member firm gave plaintiff the purported latest certified audit of the member firm by Haskins & Sells dated October 31, 1966, and thereupon obtained and forwarded to defendant the so-called knowledgeability letter as required by defendant.

The defendant gave plaintiff the purported certified copy of the audit by Haskins & Sells dated as of October 31, 1966 but actually dated December 14, 1966, which it still retains in its files but which in fact is a forgery by completion and which was purported to be certified by a certification of Haskins and Sells of an earlier audit. Haskins and Sells refused to certify that audit. The audit received by plaintiff from defendant and its alleged certification was dated December 14, 1966 but was not prepared at that time but was made up on or about February 20, 1967. It was altered, and Haskins & Sells had refused to make the alterations, and the member firm merely attached the December 14, 1966 certificate of Haskins & Sells to the altered audit made up on February 20, 1967.

Defendant learned and knew of this alteration upon examination of the altered audit with the false authentication on March 30, 1967 and May 10, 1967 when it was checked by its examiners with the report to the S.E.C. certified on December 14, 1966 by Haskins & Sells.

Defendant knew of the difference of classification of the report, which was the alteration but decided it did not matter and it did not require certification by Haskins and Sells of the altered audit. What was obscured was that its principal officers had embezzled $318,000 from the member firm.

The embezzlement was suppressed by defendant who knew of it on or prior to June 16, 1966 but acquiesced in the substitution by the embezzlers of capital stock in place of the cash. Defendant facilitated criminally the compounding of the crime and did not take the necessary action required by its rules against the embezzlers. As a result when in February 1967 or even earlier the member firm had become insolvent these same officers had increased their embezzlements to some $600,000 a sum sufficient to render this small member firm insolvent.

In the meantime the defendant by various means had delayed the public discovery of these embezzlements by procuring the appointment without any legal sanction of any kind of their employee McChesney, Chief Examiner of defendant New York Stock Exchange, as unofficial liquidator of the insolvent firm, who took over all the accounts and assets including plaintiff's account without any consent from him and proceeded to operate them as defendant wished, and expended the proceeds in its illegal acts and administration of these assets.

THE REASON WHY THE QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION WITH BRIEFS ON THE MERITS AND ORAL ARGUMENTS.

The decision ignores the fact that it is based on facts that include ignoring a forgery by completion by defendant-appellee respondent with knowledge thereof, and acts participated in by defendant-appellee respondent that constitute criminal facilitation in compounding crime under the Penal Law of the State of New York, for their own advantage and profit.

Here is the defendant-appellee New York Stock Exchange a nationally known institution, having quasi-official status, deliberately accepting as a valid authentication by accountants, Haskins & Sells of a financial report of a member firm, required by its rules to be distributed to its customers, and on which defendant-appellee specifically required plaintiff-appellant to rely, which certification they knew was the certification of an earlier document not authorized by the certifier Haskins & Sells to be appended to the document given to plaintiff-appellant.

The decision further ignores the fact that the defendant appellee New York Stock Exchange with knowledge of the embezzlement by the principal officers of the member firm in June 1966 in violation of its Rules having the force of law, did not expose and punish this embezzlement and participated in an agreement of June 16, 1966 which was criminal facilitation of compounding a crime under the Penal Law of the State of New York.

That the immorality and illegality of the acts in which defendant-appellee respondent knowingly participated should not in the interest of justice be countenanced by this Court or the Courts of the United States. Only by these acts having been suppressed could plaintiff-appellant petitioner have been induced to subordinate his account.

In so doing the Courts below have so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower Court, to call for an exercise of this Court's power of supervision.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction is founded on the existence of a Federal question and the amount in controversy. The action arises under the Securities Exchange Act of 1934, being the Act of 1934, U.S.

C. S. 404, 48 Stat. 881, Title 1, Section 1, as amended, as herein is more fully set forth. The matter is controversy exceeds, exclusive of interest and costs the sum of ten thousand dollars.

CONCLUSION

FOR THESE REASONS, STATED ABOVE, IT IS PRAYED THAT A WRIT OF CERTIORARI ISSUE TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW ITS AFFIRMANCE OF THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT.

Respectfully submitted,

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APPENDIX "A"

MEMORANDUM DECISION BY BONSAL, D.J.
DATED JULY 9, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERRIT LANSING,

Plaintiff,

-against-

NEW YORK STOCK EXCHANGE,

Defendant.

Appearances:

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RUSSELL E. BROOKS, ESQ.
MARTHA G. BANNERMAN, ESQ.
Of Counsel

MEMORANDUM

BONSAL, D.J.

At the end of plaintiff's case on May 23, 1973, the Court dictated findings of fact and conclusions of law, which are

reported on pages 427-439 of the transcript, and granted defendant New York Stock Exchange's motion to dismiss the complaint.

The following will supplement the findings and conclusions heretofore made:

Plaintiff instituted this action against defendant, New York Stock Exchange ("the Stock Exchange"), on July 12, 1968.

The action was brought to recover $77,000 in securities which plaintiff subordinated to the claims of creditors of the brokerage house of Pickard & Co., Inc. ("Pickard") and $250,000 in exemplary damages. The amended complaint alleges two causes of action — the first arising under the Securities Exchange Act of 1934 ("Act") (15 U.S.C. Sections 78a et seq.) and the second arising under the New York Penal Law.

All parties having waived a jury trial, this case was tried to the Court on May 21-23, 1973. At trial, plaintiff testified and called as witnesses: Mr. Edward Lill, a certified public accountant and a partner in the accounting firm of Haskins and Sells who supervised a surprise audit of Pickard in 1966; Mr. Robert Bishop, who, from 1966-68, was vice-president and director of the Department of Member Firms of the Stock Exchange; Mr. Joseph V. Shields ("Shields"), a former officer, director and shareholder of Pickard, who joined Pickard in 1963; and Colonel Thomas Magness, a retired army officer from Virginia who became a subordinated lender and non-voting shareholder of Pickard on July 28, 1967.

This Court has subject matter jurisdiction with respect to the Stock Exchange's alleged violation of the Act and of the rules promulgated thereunder, and with respect to the Stock Exchange's alleged violations of its duties under the Act and Rules. *Weinberger v. New York Stock Exchange*, 335 F. Supp. 139 (S.D.N.Y. 1971).

Plaintiff, a resident of New York City and a 1966 graduate of New York University, was a customer of Pickard, a member firm of the Stock Exchange. Pickard was formed in 1963 and was registered as a broker-dealer with the Securities and Exchange Commission until November 14, 1968 when its registration was revoked. During the relevant period, John Sackville-Pickard was president of Pickard, Peter Sackville-Pickard was vice president and secretary-treasurer, and Shields was executive vice-president. At the time of the commencement of this action, the Stock Exchange was an unincorporated association organized under the laws of New York. On February 18, 1971, the Stock Exchange was incorporated under the Non Profit Corporation Law of New York.

At all relevant times, the Stock Exchange was registered under Section 6 of the Act (15 U.S.C. §78f). Under this section, the Stock Exchange has certain regulatory duties with respect to its members, which it carries out through its Department of Member Firms. The Stock Exchange requires each member firm to employ an Auditor who makes a surprise audit of the firm each year at a time determined by the Auditor, and to be completed within thirty days. Following the audit, the Auditor fills out an "Answers to Financial Questionnaire" (the "Financial Questionnaire") and files it with the Stock Exchange. Within 30 days of the completion of the audit, the member firm must either send to its customers a customer statement, based on the surprise audit and which is a fair presentation of the data in the audit, or must inform them that a copy is available to them. A copy of the customer statement must be filed by the member firm with the Stock Exchange, where it is examined and reconciled with the Financial Questionnaire filed by the Auditor.

The Stock Exchange has established a trust fund, administered by trustees, to protect customers with respect to losses suffered by them in dealing with member firms.

Prior to June 1967, plaintiff had a custodian account with the

Bank of New York and, since 1964, the investments in the account were handled by Shields, at Pickard, whom plaintiff had known for many years. In early 1967, Shields suggested that plaintiff transfer his account to Pickard, becoming a subordinated lender, which meant that his account would be considered a part of the capital of the firm, and in return, plaintiff would get a 6% return on his account, in addition to dividends, interest and capital appreciation. Plaintiff could also enroll in Pickard's trainee program. Shields showed plaintiff two Statements of Financial Condition of Pickard, dated September 30, 1965 and October 31, 1966. The Statement dated October 31, 1966 was based on a surprise audit of Pickard conducted by Pickard's auditors, Haskins and Sells. This statement was filed with the Stock Exchange on February 20, 1967, and its examiners reconciled the Statement with the Financial Questionnaire filed by Haskins and Sells. The Statement dated October 31, 1966 contained two items whose legends were changed from the original audit. The "Receivable from officers" of $106,549.04 was changed to "Receivable from stockholders," and "Notes receivable from officers" of $218,041 was changed to "Notes receivable (guaranteed by stockholders)." Plaintiff conducted further investigations into Pickard including the reading of Dun and Bradstreet reports, and consulted with his attorney, Mr. Delaney, who met with Shields with respect to the subordination agreement.

Plaintiff transferred his account to Pickard, and on June 6, 1967 he executed a subordination agreement subordinating his account, which had a debit balance of $77,000. In connection with the subordination of his account, plaintiff purchased 100 shares of non-voting stock of Pickard at $100 per share. Plaintiff paid for this stock with a loan from Pickard secured by stock of Shell Oil Co.[1] Plaintiff also signed a financial supplement, dated

1. Shields told plaintiff that in order to become a 6% subordinated account lender, plaintiff had to purchase non-voting shares of Pickard pursuant to a requirement of the Stock Exchange.

June 6, 1967, to an application to the Stock Exchange to become a non-voting stockholder; a letter dated June 6, 1967, to the Stock Exchange agreeing not to encumber his non-voting stock; and a "knowledgeability" letter dated June 6, 1967, to the Stock Exchange, stating that he had investigated the financial condition of Pickard, that the Stock Exchange has no obligation to disclose any facts to plaintiff concerning Pickard, and that plaintiff would hold the Stock Exchange harmless on any claim against such firm. Plaintiff also signed an application dated June 13, 1967 to the Stock Exchange seeking its approval to become a non-voting stockholder of Pickard and a subordinated lender.

Plaintiff went to work for Pickard as a trainee in September of 1967, and in early 1968 received training to be a registered representative.

Prior to June 1967, the Stock Exchange instituted two disciplinary proceedings against Pickard. The first was instituted on January 11, 1966 for a violation of Rule 325 — the Capital Rule. The second proceeding was instituted on February 7, 1967 for a violation of the Capital Rule and with respect to the segregation of securities, and Pickard and its officers were censured and fined $5,000.

On October 25, 1967, Haskins and Sells began a surprise audit of Pickard, which they were unable to complete in late December or early January of 1968 due to the condition of the records at Pickard. This was reported to the Stock Exchange, and on or about January 26, 1968, Mr. Bishop called a meeting at the offices of Pickard at which all directors and voting stockholders were present, and informed those present that Pickard needed additional capital. By letter dated February 9, 1968, the Stock Exchange imposed certain restrictions on the activities of Pickard. By agreement dated February 13, 1968, the Stock Exchange agreed to help Pickard with its record keeping problems, and thereafter, employees of the Stock Exchange worked at Pickard. The Stock Exchange's trust fund advanced

money to Pickard and, in accordance with its prior agreement with Pickard, the Stock Exchange designated McChesney, its chief examiner, as liquidator of Pickard. On August 8, 1968, both John and Peter Sackville-Pickard were expelled from the Stock Exchange for fraud and misstatements, including improper redemption of stock, improper payments from Pickard to their wives, and the improper taking of loans from Pickard.[2]

In the amended complaint, plaintiff alleges that the Statement of Financial Condition dated October 31, 1966, on which plaintiff testified that he relied in subordinating his account, was materially false or "grossly or negligently inaccurate"; that the Stock Exchange knew that the Statement was false; and that the Stock Exchange aided and abetted Pickard in inducing plaintiff to subordinate his account. However, plaintiff has produced no evidence to support these allegations or to show that the Stock Exchange had any duty with respect to the Statement, which it did not discharge. The testimony indicates that the change in the legent from "officers" in the original audit to "stockholders" in the customer statement was immaterial since all the officers were stockholders.[3] Plaintiff testified that he did not inquire into the identity of the stockholders who were indebted to Pickard. See *List v. Fashion Park, Inc.*, 340 F.2d 456, 462 (2d Cir.), *cert. denied sub nom. List v. Lerner*, 382 U.S. 811 (1965); *Cohen v. Franchard*, ———F.2d——— (2d Cir. Apr. 11, 1973); *Lanza v. Drexel*, ———F.2d——— (2d Cir. Apr. 26, 1973).

2. One of these loans appears in the audited Statement of Financial Condition dated October 31, 1966 beside the legend "Notes receivable from officers" in the amount of $218,041. This inedbtedness arose out of an agreement dated June 16, 1966 in which John and Peter Sackville-Pickard took over the indebtedness of Anglo American Properties, Inc., a corporation controlled by them, and further agreed to secure the debt with stock of Pickards. A copy of this agreement was sent to the Stock Exchange. Anglo American Properties, Inc. went into bankruptcy.

3. Mr. Bishop testified that Pickard had nine stockholders and five officers, and that all of the officers were stockholders.

No evidence was presented at trial to show that the Stock Exchange violated the Act or Rules or any duties it assumed under the Act or Rules, and no evidence was produced to show that the Stock Exchange violated the New York Penal Law.

The foregoing constitutes the Court's findings of fact and conclusions of law. Rule 52(a), Fed. R. Civ. P.

Judgment in favor of the Stock Exchange dismissing the complaint may be entered accordingly.

s/D.B. Bonsal
U.S.D.J.

Dated: New York, N.Y. July 9, 1973.

APPENDIX "B"

JUDGMENT OF SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-four.

PRESENT:

HON. STERRY R. WATERMAN
HON. WILLIAM H. MULLIGAN
Circuit Judges

HON. FREDERICK vP BRYAN,
District Judge

(SAME TITLE)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX "C"

JUDGMENT OF SOUTHERN DISTRICT OF N.Y.

(SAME TITLE)

The issues in the above entitled action having been brought on regularly for trial before the Honorable Dudley B. Bondal, United States District Judge, on May 21, 22 and 23, 1973, and at the conclusion of the plaintiff's case, the defendant having moved the Court to dismiss the complaint, and the Court having granted the said motion, it is,

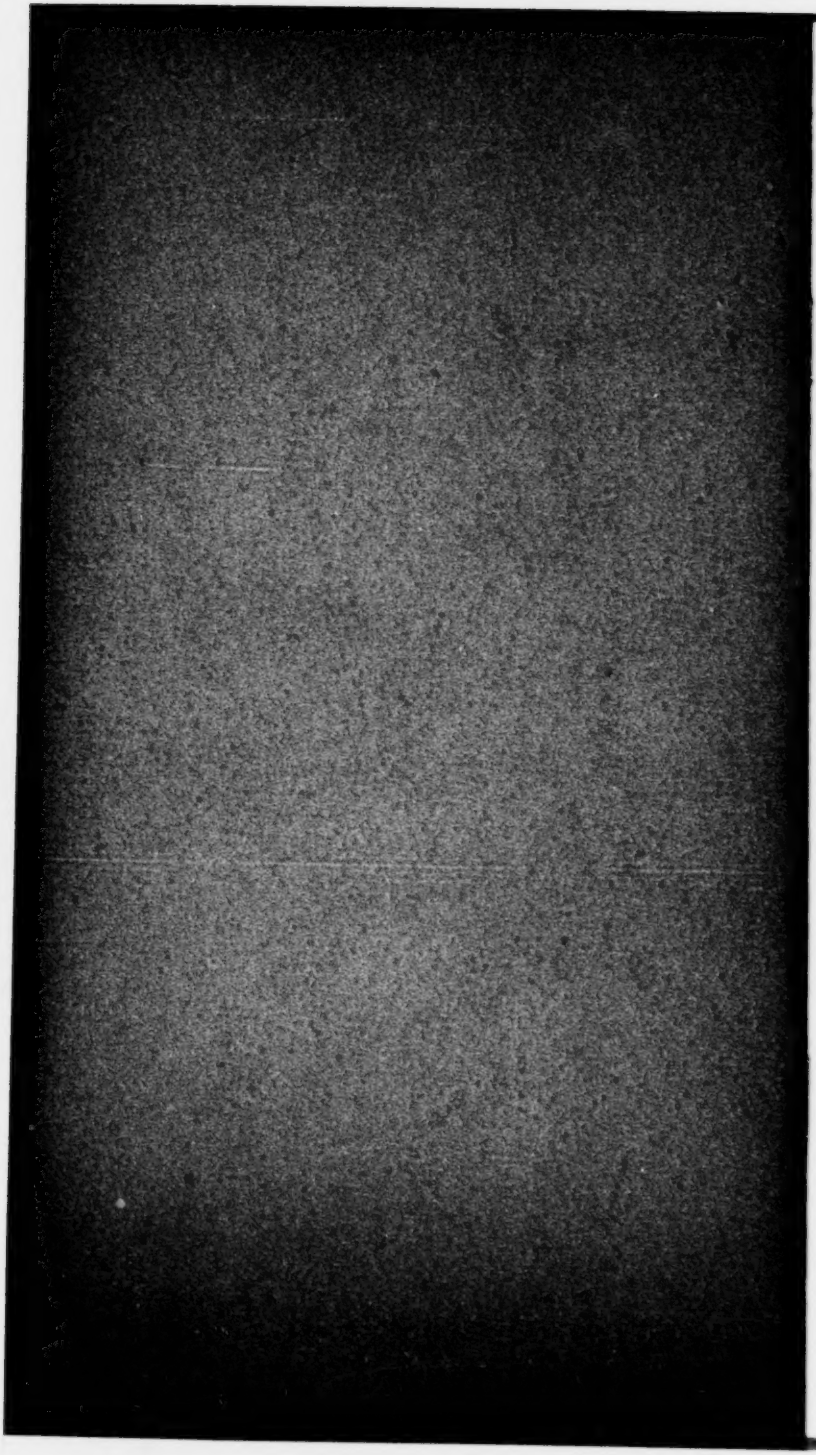
ORDERED, ADJUDGED AND DECREED: That the defendant, NEW YORK STOCK EXCHANGE, have judgment against the plaintiff, GERRIT LANSING, dismissing the complaint.

Dated: New York, N.Y.
May 24, 1973

s/Thomas E. Andrews
Clerk

6/19/73 — Appearance in opposition noted. Bill of Costs taxed in favor of the defendant in the amount of $293.50 and docketed as Jud. #73,542.

s/Raymond F. Burghardt
Clerk



MAY 2 1974

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-1597

GERRIT LANSING,

Petitioner,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY

April 30, 1974

The District Court dismissed at the close of the plaintiff's case pursuant to Rule 41(b), Federal Rules of Civil Procedure, because it found:

> "No evidence was presented at trial to show that the Stock Exchange violated the Act or Rules or any duties it assumed under the Act or Rules, and no evidence was produced to show that the Stock Exchange violated the New York Penal Law." (A-7 to Petition)

After oral argument, the Court of Appeals unanimously affirmed from the bench without opinion. Plaintiff's statement of the issues (Petition 2-3) makes clear that petitioner seeks to have this Court review the evidence and hopefully reach a different conclusion. Such a case does not meet any criterion of this Court's Rule 19. The Court does "not grant certiorari to review evidence and to discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY

April 30, 1974